

Legal options to avoid a gap and legal implications of a possible gap

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Introduction

1. During the negotiating session in Bonn in June 2010, the AWG-KP requested the Secretariat's legal service to prepare a paper on how to avoid a gap between the first and second commitment periods and to identify the legal consequences of any such gap.

2. The formal request is as follows:¹

“In the context of decision 1/CMP.1 [i.e. to ensure no gap], the AWG-KP requested the secretariat to prepare, for consideration by the AWG-KP at its thirteenth session, a paper that:

(a) Identifies and explores all the legal options available, including proposals by Parties, inter alia as contained in document FCCC/KP/AWG/2010/6/Add.1, aiming at ensuring that there is no gap between the first and subsequent commitment periods; and

(b) Identifies the legal consequences and implications of a possible gap between the first and subsequent commitment periods.”

3. This briefing note examines these questions, from a legal perspective, before submission or publication of the paper of the Secretariat.

Legal options available to avoid a gap between the first and subsequent commitment period

Formal amendment or successor protocol

4. It should be noted at the outset that a *formal amendment* to the Kyoto Protocol to provide for stronger commitments over a longer time period would be the most desirable path as:

- it is the method of amendment provided for by the Kyoto Protocol;
- it would provide a legal basis for the prolongation of existing commitments or the introduction of stronger commitments; and
- it would provide a legal basis for the continued existence of the flexibility mechanisms and institutional framework of the Kyoto Protocol.

5. Another option would consist of the conclusion of a *new successor agreement* which would enter into force after the end of the first commitment period.

¹ <http://unfccc.int/resource/docs/2010/awg12/eng/l04.pdf>, in fine.

Provisional application of an amendment

6. Either scenario (viz. formal amendment or the conclusion of a successor agreement) could in theory be combined with the technique of ‘*provisional application*’ as understood in Article 25 of the Vienna Convention on the Law of Treaties (VCLT). The latter provision provides that:

“1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”

7. Provisional application is a legal technique which has, amongst others, been used in the Energy Charter² and some arms control treaties, including the 1992 Chemical Weapons Convention and the Comprehensive Nuclear-Test-Ban Treaty (CTBT), so as to bridge the gap between the adoption of a treaty/amendment and its actual entry into force.
8. Although Article 25 of the VCLT refers specifically to ‘a treaty or part of a treaty’, there is no reason why amendments to a treaty could not similarly be provisionally applied. The simplest legal solution, therefore, (save for formal amendment) would be to ‘provisionally apply’ the necessary amendments to the Kyoto Protocol and its annexes such that it provides for a second commitment period pending the amendments’ formal entry into force. Such a decision of provisional application should be made at the time of adopted the amendments.
9. It should be stressed, however, that although “provisional application” may bridge a potential gap which arises in the event a second commitment period does not enter into force immediately following the end of the first commitment period, the use of provisional application presupposes that States first agree on the content of the relevant amendments to the Kyoto. This also implies that the voting thresholds of Article 20 KP must be achieved³ Accordingly, ***provisional application would only seem to make sense if political agreement on further commitments is established first.***

Gentleman’s Agreement

10. Although States are free to amend the Kyoto Protocol (in accordance with its amendment clause) or to conclude a new treaty (either to prolong the existing commitments or to install stronger ones), the conclusion of a ‘*Gentleman’s Agreement*’ would appear to make little sense in the present context. Indeed, as the label illustrates, this is not a legally binding

² *Yukos Universal Ltd. v. Russian Federation*, Ad hoc UNCITRAL arbitration administered by the Permanent Court of Arbitration (PCA) in The Hague, 30 November 2009; A. M. Niebruegge, “Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law”, *Chicago Journal of International Law* Vol. 8, No. 1, 355-376; http://www.herbertsmith.com/NR/rdonlyres/5AEC4529-C26C-4C79-A3AB-BF064A234D42/13654/Investment_protection041209.html; see also ICSID tribunal’s decision in *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, <http://www.globalarbitrationreview.com/reviews/3/sections/5/chapters/65/provisional-application-energy-charter-treaty/>

³ It would also be possible for States Parties to adopt an amendment of the Kyoto Protocol relaxing the existing procedural requirements for amendment/ratification. However, such amendment would itself still be subject to the current procedural requirements, implying that it would not offer a solution to overcome the timing difficulties under consideration. On the other hand, it could be a valuable construction to avoid similar problems in respect of later (3rd, 4th etc.) commitment periods.

instrument. Hence it would offer no solution in terms of substantive obligations (legally binding emission reduction targets). Neither could it ensure the continuance of all of the flexible mechanisms or the Kyoto Protocol's institutional framework.

CMP decisions

11. Furthermore, in accordance with the provisions of the Kyoto Protocol, the *CMP* is not competent to amend the Protocol. If the *CMP* (or the *COP*) were to adopt such a decision, the resulting normative framework would rest on a very dubious legal basis (which is no problem as long as there is the political will to continue, but which will generate difficult legal problems once disagreement arises).
12. If, however, the *CMP* were to take a decision by unanimity (and not just by consensus), it could be argued that such a decision is the equivalent of an agreement for a new treaty in disguise, rather than simply a traditional *CMP* decision. This would, nonetheless, seem to be an unlikely scenario (if sufficient votes exist; amendment is again the logical option to ensure compatibility with the flexible mechanisms and institutional framework) and in our view is still a weak argument on which to base the creation of further legally binding commitments for the relevant States.

Unilateral declarations

13. The issuing of *Unilateral Declarations* could prolong the binding nature of the commitments entered into by the State(s) concerned: a State could either declare that it considers itself to continue to be bound by the existing emission reduction target, but it could also spell out stronger commitments of course.
14. Unilateral Declarations have been used e.g. in the Strategic Arms Limitation Talks (SALT) between the United States and the then Soviet Union to bridge the gap between the end of the first round (SALT I) and the start of the second round (SALT II). The first round had led to an *Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Arms* ('Interim Agreement') which stated that parties intended to replace it as soon as possible with a more comprehensive agreement. As the expiry date of the Interim Agreement, which had a term of 5 years, came nearer, it became apparent that the SALT II negotiations on this more comprehensive agreement would not be concluded until after that date. Therefore, the gap was bridged by two unilateral declarations, one by the US and one by the Soviet Union on 23 and 26 September 1977 respectively.⁴
15. As long as the unilateral declaration is cast in 'legally binding' terms (this is a matter of examining the wording & context), it could effectively create internationally binding obligations on the part of the State issuing the unilateral declaration. However, unilateral declarations cannot as such establish a link with the Kyoto Protocol's flexible mechanisms or ensure their continued functioning. A state can be bound by its own declaration, but it can not merely declare certain institutions or even a treaty applicable to itself.

⁴ See about Unilateral Declarations: B. MÜLLER, W. GELDHOF, T. RUYS, "Unilateral Declarations: the missing link in the Bali Action Plan", *European Capacity Building Initiative*, www.EuroCapacity.org, www.OxfordClimatePolicy.org, www.ggs.kuleuven.be, www.ugent.be/re/publiekrecht/nl/instituten/milieu-energierecht, May 2010.

Legal implications and consequences of a gap between commitment periods

General principle: continued validity of the Kyoto Protocol as such

16. With regard to the the legal consequences of a gap between two commitment periods to the institutions and mechanisms of a treaty installing the first commitment period, no precedents or explicit literature exist. For this reason, the present analysis is primarily based on the text of the Kyoto Protocol and the UNFCCC, the COP and CMP decisions, general principles and the Vienna Convention on the Law of Treaties.
17. First of all, the Kyoto Protocol does not cease to exist on 31 December 2012. It is the first commitment period (2008-2012) that comes to an end. In this context, reference should be made to Article 42(2) VCLT, according to which “[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the [VCLT]. The same rule applies to suspension of the operation of a treaty.”⁵
18. Since the Protocol only contains provisions on withdrawal and amendment, this means that possible termination or suspension is governed by the residuary rules of the law of treaties. Consequently, the Kyoto Protocol could be terminated most notably as a result of the conclusion of a later treaty; agreement among the parties; possibly also as a result of the reduction of the Parties below the number necessary for entry into force (due to withdrawals); as a result of ‘supervening impossibility of performance’; or a ‘fundamental change in circumstances’. The two latter grounds for termination do not appear to be applicable in the present case. Thus, **as long as none of the other grounds for termination would materialise, the general finding appears to be that the Kyoto Protocol as such continues to exist, even after expiry of the first commitment period.**
19. Indeed, the conclusion of the first commitment period certainly does not render the Protocol obsolete or ‘impossible to perform’. The Kyoto Protocol (and therefore all the decisions from the CMP and the Adaptation Fund Board) will continue to exist after 2012. Additionally, the CMP itself will continue to exist and be competent to make decisions in respect of the implementation of the Protocol. Deciding otherwise, in the absence of any provision in the KP concerning its termination or suspension, is arguably contrary to the overarching objective of the UNFCCC which is “(...) to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.⁶

Possible reliance on the ‘stand-still principle’ – two possible approaches

20. The question nonetheless arises whether the KP continues to apply *in its entirety or not*. Indeed, one cannot ignore that several provisions of the Protocol and CMP provisions are specifically intended to implement the emission reduction targets of the first commitment period. In other words, does the Kyoto Protocol maintain its full validity or does it merely live on as an empty shell consisting of certain institutional arrangements without underlying substantial obligations? A possible solution to this conundrum could be to rely on the *stand-still principle* in (international) environmental law (whereby states are enjoined from passing legislation which violates international law).

⁵ Art. 42.2 Vienna Convention on the Law of Treaties; see also Art. 57 and 44.

⁶ article 2 UNFCCC

21. By giving a broad meaning to the Stand-still Principle, it could be argued that the targets of the first commitment period would continue to apply for all Parties to the Kyoto Protocol for an indefinite period of time, pending the introduction of a second commitment period. If this interpretation were to be followed, the implication would be that all the flexible mechanisms and institutional arrangements would continue to operate unchanged. The problem with this 'business as usual'-model, however, is that the legal basis of the stand-still principle as a binding principle of customary international law⁷ continues to be uncertain. We found no case law or legal doctrine or practice recognising the Stand Still Principle as being a binding principle of international customary law.
22. It should moreover be recalled that, especially in international environmental law, there are other examples of treaties with binding emission reduction obligations within a certain timeframe, e.g. the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol). Under the Montreal Protocol, Parties agreed to set consumption and production limitations of ozone depleting substances. However, contrary to the Kyoto Protocol, the language use in the Montreal Protocol clearly sets an indefinite obligation:
- "Each Party shall ensure that for the twelve-month period commencing on (...) and in each twelve-month period thereafter ..."*⁸
23. In other words, in the absence of specific wording in the KP about renewal / succession of the first commitment period, the stand-still principle is highly unlikely to offer a sufficient legal basis to justify the continued application of the same emission reduction obligations as foreseen by the (first commitment period of the) KP after 2012.
24. Given this, below, we examine in greater detail the extent to which the existing Kyoto institutions and mechanisms will continue to function in the absence of a second commitment period or the application of the stand-still principle to extend the first commitment period targets indefinitely.

The Flexible Mechanisms

25. The *Kyoto Protocol flexible mechanisms* are Joint Implementation (Art. 6), the Clean Development Mechanism (Art. 12) and International Emissions Trading (Art. 17). Articles 6, 12 and 17 thereby provide that these mechanisms may be used by States for meeting their commitments under Article 3 – their quantified emission (reduction) obligations. The absence of a new commitment period following the period 2008-2012, raises questions over whether there is any legal basis for the flexible mechanisms to be used post 2012: if there is no binding reduction target, there is no Assigned Amount. Therefore Joint Implementation projects could no longer generate offsets because countries would no longer have AAUs from which the JI credits (ERUs) are drawn.⁹ The same reasoning applies *a fortiori* to International Emissions Trading.
26. However, this reasoning seems not to apply to the Clean Development Mechanism. Articles 12(2) and 12(3) of the Kyoto Protocol state:

⁷ Cf. Article 38(1) ICJ Statute.

⁸ Art. 2A-2I Montreal Protocol.

⁹ Climate Focus, Domestic Offsets under Article 24a, 22 February 2010, http://climatefocus.com/news/Article_24a_EU_ETS_Roundtable_Background_Paper_v1.0_22Feb10.pdf, 10.

“Article 12

1. [...]

2. The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

3. Under the clean development mechanism:

(a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and

(b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.”

27. It is clear that helping Annex I Parties meet their emission reduction targets under Article 3 of the Kyoto Protocol is one of the objectives of the CDM, but this does not mean that the CDM can not exist legally without such emission reduction targets. Indeed, the objective of a legal instrument should not be confused with its conditions for existence. Moreover, helping Annex I Parties to comply with their targets is not the only objective of the CDM: *“contributing to the ultimate objective of the Convention”* is another and even more fundamental objective of the CDM. This ultimate objective of the Convention is:

*“(...) to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.*¹⁰

28. It is beyond doubt that this objective is in no way dependent on any commitment period under the Kyoto Protocol. Therefore, while the ultimate objective of the UNFCCC remains in force, and irrespective of the existence of a second commitment period (be it through an amendment to the Kyoto Protocol or a successor agreement), it follows that the CDM is one of a number of ways of achieving that ultimate objective and thus this mechanism would remain in force.
29. In this regard, reference should also be made to the European Union, which has adopted legislation that, even in a scenario where no global agreement is reached, presupposes the possibility of erecting new CDM projects after 2012.
30. It can be concluded that in the absence of a binding commitment period after 2012, the flexible mechanisms Joint Implementation and International Emission Trading can no longer be used. However, the Clean Development Mechanism has no necessary link with a binding commitment period and can legally exist without one.¹¹

¹⁰ Article 2 UNFCCC

¹¹ See W. GELDHOF and T. DERUYTTER, “The Copenhagen Accord and the Clean Development Mechanism. An assessment of the legality of CDM projects and the likely demand for CERs after 2012”, RDAI 2010, forthcoming.

Adaptation Fund and Board

31. Several provisions in the UNFCCC and KP address the ‘funding’ of the fight against climate change, in the form of mitigation and adaptation. Developing countries require international funding to support adaptation.¹²
32. The UNFCCC defines a Financial Mechanism in its article 11 and the Parties to the Convention assigned the operation of the Financial Mechanism to the Global Environment Facility (GEF). The Financial Mechanism is accountable to the COP, which decides on its climate change policies, programme priorities and eligibility criteria for funding, based on advice from the SBI (Subsidiary Body for Implementation).
33. In addition to providing guidance to the GEF, Parties to the UNFCCC have established two *special funds* under the Convention: the Special Climate Change Fund (SCCF) and Least Developed Countries Fund (LDCF). There is no question on the future of these funds in light of a possible gap between two subsequent commitment periods based on the KP.
34. The Kyoto Protocol also recognises, under its Article 11, the need for the Financial Mechanism to fund activities by developing country Parties. More importantly, article 12, para 8 on the CDM states that the CMP will ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.
35. In 2001, article 12, para 8 KP was the catalyst for the COP (the KP was not yet into force and thus no CMP had been convened at that time) establishing an Adaptation Fund,¹³ using the legal basis found in Article 11 UNFCCC ‘Financial Mechanism’.
36. At the third session of the CMP, which was held in Bali, Indonesia, in 2007, Parties decided to establish the Adaptation Fund Board (AFB) as the operating entity to supervise and manage the Adaptation Fund, under the authority and guidance of the CMP.¹⁴ The AFB is fully accountable to the CMP, which decides on the overall policies of the Adaptation Fund. The Global Environment Facility (GEF) provides secretariat services to the AFB and the World Bank serves as trustee of the Adaptation Fund on an interim basis. These interim institutional arrangements will be reviewed in 2011.¹⁵
37. The Adaptation Fund is financed, on the one hand, from the share of proceeds on the clean development mechanism project activities. This amounts to 2% of certified emission reductions (CERs) issued for a CDM project activity. It is also financed, on the other hand, by other sources of funding, implying that it is not fully dependent on the CDM and the issuance of CERs to function. However, this is not an issue anyway since the CDM would continue to exist in the event that a gap exists between commitment periods.
38. It is said that the Adaptation Fund is established under the KP.¹⁶ Although it is steered by the CMP, it was actually established by a COP decision. It could, therefore, be seen as a “hybrid fund”, falling under the general provisions on the Financial Mechanism of the UNFCCC, but also with its own board established by a CMP decision.

¹² Articles 4.4, 4.8 and 11 of the UNFCCC and articles 3.14, 11.2 and 12.8 of the KP.

¹³ Decision 10/CP.7 ‘Funding under the Kyoto Protocol’, FCCC/CP/2001/13/Add.1.

¹⁴ Decision 1/CMP.3 ‘Adaptation Fund’, FCCC/KP/CMP/2007/9/Add.1

¹⁵ See also: Adaptation Fund Board, Seventh meeting, Bonn, September 14-16, 2009, BACKGROUND OF THE ADAPTATION FUND, AFB/B.7/Inf.3, July 21, 2009; and <http://www.adaptation-fund.org/keydecisions>

¹⁶ <http://unfccc.int/adaptation/items/4159.php> and other

39. In any case, even if one were to say that the Adaptation Fund and the AFB fall only under the KP, this does not raise any issues in the context of a gap between commitment periods. As stated above, the Kyoto Protocol and all CMP decisions will continue to exist after 2012 – neither the Adaptation Fund nor the Adaptation Fund Board depend on the existence of a commitment period.
40. Moreover, the COP, CMP and Adaptation Fund Board decisions do not contain provisions on how and when the working of the Adaptation Fund should end. The Adaptation Fund and its Board would therefore exist until an explicit decisions by the COP and CMP are taken in this regard.

Compliance Mechanism

41. Article 18 of the Kyoto Protocol calls on the CMP to approve, at its first session, “procedures and mechanisms” to determine and address cases of non-compliance with the Protocol.
42. The first set of rules relating to the procedures and mechanisms for non-compliance with the Protocol were in fact taken prior to the first session of the CMP by decision 24 of the 7th COP in Marrakesh. Decision 24/CP.7 was confirmed by the CMP in decision 27/CMP.1.¹⁷ In addition, the first CMP also decided to consider an amendment to the Protocol in respect of procedures and mechanisms relating to compliance. The proposed amendment would have made the consequences in decision 27/CMP.1 binding on Parties which ratified it, in conformity with Article 18 of the Protocol, which stipulates that any binding consequences of the compliance mechanism shall be adopted by amendment. This amendment was never adopted. Judicially the Compliance Mechanism has no power to enforce sanctions, since no binding measures can be taken without such an amendment.¹⁸
43. There seem to be no legal issues regarding the existence of the Compliance Mechanism and the Compliance Committee in the event there is a gap between commitment periods. Whereas the parties will have no obligations with regard to quantified emission limitation or reduction commitments, they will still have other obligations, such as monitoring, verification and reporting, which need compliance review, in both the facilitative branch as well as in the enforcement branch.
44. As such the Compliance Procedures state with regard to the facilitative branch:
- “the facilitative branch shall be responsible for addressing questions of implementation:*
- (a) Relating to Article 3, paragraph 14, of the Protocol, including questions of implementation arising from the consideration of information on how a Party included in Annex I is striving to implement Article 3, paragraph 14, of the Protocol; and*
- (b) With respect to the provision of information on the use by a Party included in Annex I of Articles 6, 12 and 17 of the Protocol as supplemental to its domestic action, taking into account any reporting under Article 3, paragraph 2, of the Protocol.”*
45. Similarly, the enforcement branch also has a role in respect of obligations other than quantified emission limitation or reduction commitments:

¹⁷ Decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3 (hereinafter Compliance Procedures).

¹⁸ M. MONTINI, “The compliance regime of the Kyoto Protocol” in WYBE TH. DOUMA (ed.), *The Kyoto Protocol and Beyond, Legal and Policy Challenges of Climate Change*, T. M. C. Asser Institute, The Hague, 2007, 95-109.

“The enforcement branch shall be responsible for determining whether a Party included in Annex I is not in compliance with:

(a) Its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Protocol;

(b) The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol; and

(c) The eligibility requirements under Articles 6, 12 and 17 of the Protocol.”

Secretariat

46. The KP states in its Article 14 that the Secretariat of the UNFCCC will function as the Secretariat of the KP. The Secretariat as such will therefore continue to exist. The functions of the Secretariat related to the quantified emission limitation or reduction commitments and commitment period would, in case of a gap between two commitment periods, at least be suspended, without prejudice, however, to the other functions and tasks delegated to it by the KP.

SBSTA and SBI

47. The Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation established by Articles 9 and 10 of the Convention shall serve as, respectively, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of this Protocol.¹⁹ Similar to the Secretariat, no legal issues seem to arise concerning a gap between two commitment periods with regard to the functioning of the SBSTA and SBI.

Conclusion

48. In the absence of a formal amendment to the Kyoto Protocol, and in order to maintain all the existing institutions and mechanisms, the option most likely to ensure there is no gap between the first and second commitment period is the provisional application of amendments to articles in and annexes of the Kyoto Protocol such that a second commitment period is agreed. These amendments would be provisionally applied until such time as the amendments formally enter into force.
49. However, as mentioned above, provisional application would only seem to make sense if political agreement on further commitments is established first.
50. In the event the first commitment period comes to an end without a second commitment period being agreed, the Kyoto Protocol itself does not cease to exist. It is unlikely that it could be argued that emission reduction obligations continue to exist after the end of the first commitment period (where no second period has been agreed) on basis of the Standstill-principle.
51. However, plenty of other obligations will continue to exist. In particular, the obligation for parties to the Kyoto Protocol to submit National Inventory information would remain in force. Compliance with these obligations, will continue to be overseen by the Compliance Committee.

¹⁹ Art. 15 KP.

52. The Kyoto Protocol and all the decisions from the CMP, the CDM Executive Board, the Adaptation Fund Board, Compliance Committee, the Secretariat, the SBI and the SBSTA would continue to exist after 2012 regardless of whether there is a commitment period.
53. Of the Kyoto institutions, only Joint Implementation and the International Emissions Trading will cease to have a legal basis in the event of a gap between commitment periods. The CDM, compliance mechanism, adaptation fund would all continue to exist.